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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHN ABEL, Defendant and Appellant.	A121299 (Solano County Super. Ct. No. FCR225409)

I. INTRODUCTION

Defendant John Abel (Abel) was charged with and, following a jury trial, convicted of two counts of continuous sexual abuse of a child in violation of Penal Code section 288.5, subdivision (a).[1] On appeal, Abel maintains evidence that he accessed child pornography Web sites was improperly admitted and prejudicial. He also argues testimony of the children's mother under the fresh complaint doctrine was improperly allowed without limiting instructions and prejudicial.

The People concede there was an insufficient foundational showing for admission of the child pornography Web site evidence and it was erroneously admitted. We therefore do not reach Abel's other arguments about this evidence. We also conclude admitting the evidence was harmless error, under the *Chapman* or *Watson* [2] standards. We find no error in connection with the mother's testimony. Abel failed to object to the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

testimony and failed to request any limiting or modified instructions. We also find no ineffective assistance of counsel in this regard. Accordingly, we affirm the judgment of conviction.

II. PROCEDURAL BACKGROUND

The Solano County District Attorney charged Abel by information[3] with two counts of continuous sexual abuse of a child under age 14, one regarding his daughter and one regarding his son. (§ 288.5, subd. (a).) The information further alleged as an enhancement as to his son that Abel had engaged in substantial sexual conduct with the minor. (§ 12033.066, subd. (a)(8).) A jury found him guilty of both counts, and also found the enhancing allegation to be true. The trial court sentenced Abel to the midterm of 12 years on each count, to run consecutively. This timely appeal followed.

III. FACTUAL BACKGROUND

Abel is the biological father of a daughter, E.A., and the adoptive father of a son, J.A., both of whom were under the age of 14 years at the time of the charged offenses. Heather L. (Mother) is Abel's former wife and the mother of E.A. and J.A. Abel and Mother divorced in approximately 1999, and thereafter shared joint custody of the children. Mother, E.A. and J.A. moved in with Mother's parents, John and Carol L., at the time the divorce proceedings began. E.A. and J.A. lived with Mother and Abel on alternate weeks, though the custody schedule was flexible. This arrangement continued cordially for about three years.

When E.A. was about five years old, she began to resist visiting Abel. Her grandfather, John L., testified "she started hesitating and we would have to carry her from the door step to the car." John L. would "talk her into going with [Abel]" because Abel was her father. The last time E.A. visited Abel, when she was six years old, she did "not want to go, and she was in pure panic. She was hysterical."

In August 2003, when E.A. was six years old, she was in the bathroom with Mother after taking a shower. E.A. told Mother she had a rash "in her private parts."

[3] The court deemed the complaint filed as an information on January 10, 2006.

Mother testified she asked E.A. if "anybody had been touching her down there." Mother asked her that question because she had been concerned about Abel having "a lot of . . . young teenage boys, maybe between 13 and 14 year olds over at the house a lot of times" when E.A. and J.A. were there. E.A. was upset and told Mother " 'I don't want daddy to be mad at me.' " Mother asked her " 'Why would daddy be mad at you?' [a]nd she said, 'Daddy touched me down there.' " Mother asked her "was he putting medicine on your rash . . . was he helping you clean up?" E.A. said he was not. Mother tried to react calmly, and told E.A. she would not tell her father. Mother spoke with her mother, then called Child Protective Services that night. She received a return call, scheduling an appointment for E.A. to be interviewed at the Rainbow Center in Vacaville.

Mother told her son, J.A., "the reason why I was taking [E.A.]" to be interviewed. J.A. "was very, very upset" and told Mother " 'She's not telling the truth.' " Mother testified that later that evening J.A. "came downstairs and was still visibly upset. That's when he told me, '[E.A.] is not lying because daddy touches me too.' " J.A. testified he did not tell Mother all the details of what Abel did to him because he did not want Mother to worry.

E.A. testified Abel "touched me where I didn't want to be touched" when she was between three and five years old. She explained he touched her vagina with his finger when she was staying at his apartment in Vacaville. She had gone to her father's bed because she had a nightmare. Abel put his hand in her pants, and she "really didn't notice until [she] started to wake up, and he just put it inside, and [she] really didn't like it." Abel used his index finger to touch inside her vagina, and "moved it up and down." E.A. did not like it, but did not know if it was good or bad. E.A. testified she never touched Abel's private parts, though Abel encouraged her to do so. He told her "if I was ever scared I could hold his private parts, and I didn't because I thought it was gross. So, I thought it was just wrong." Abel instructed E.A. to "keep it a secret."

E.A. testified about the last time the unwanted touching occurred. She was six or seven, and had been making cookies with Abel. She sat on his lap on a chair, and "he started to do that, do what he was doing." He put his hand inside her pants, and she "told

him I didn't want it to happen because I was starting to suspect that it was bad and not very good. So, I told him to stop. Then the next day I told my mom he did that. . . ." "I was going to ask my mom if it was good or bad. And she said it was bad. So, I told her that [Abel] did that to me."

J.A. testified he first remembered Abel doing something that made him feel uncomfortable when he was two years old, though his first clear memory of a specific event was when he was six. He was staying with his father in Vacaville, and his father took him into his bedroom, and took off his pants and underpants. Abel touched his penis with his hand, using an up and down motion, and put his mouth on J.A.'s penis. Abel also had J.A. put his mouth on Abel's penis, and J.A. remembered that something white came out of Abel's penis.

J.A. testified about another incident on the couch in Abel's apartment when he was about six or seven. Abel made J.A. touch Abel's penis and make "[t]he up and down motion." Abel purportedly "paid" J.A. $5 afterward. Abel also purportedly "paid" J.A. $5 or $10 on other occasions when he forced J.A. to touch Abel's penis. Abel did not give J.A. cash, but told him he was putting the money in an account for him, and showed J.A. "the account thing on the computer."

J.A. also testified that on another occasion when he was on the couch, Abel took photographs of him naked from the waist down, wearing only a red shirt. Abel showed J.A. the pictures on his computer screen. J.A. testified that prior to that time, Abel had shown him pictures of other children on his computer screen who were naked. Some of the pictures were of naked children by themselves, some were of groups of naked children, and some showed naked children with naked adults. Abel showed J.A. pictures of naked children more than 10 times. Every time he showed J.A. the pictures, he also moved his mouth up and down on J.A.'s penis.

J.A. testified the last incident occurred when he was 10 years old. J.A. was sleeping in Abel's bed at his apartment in Vacaville. Abel kept moving his hand to J.A.'s "private area." J.A. "tried to move it away, but [Abel] kept on going back." Abel touched his penis, both over and under his clothes.

J.A. recalled Abel touching his penis while in Abel's bedroom, on the couch, and in a chair by the computer in Abel's residence. Between the time of the incident when he was six and the incident when he was 10, Abel touched his penis "countless" times, "[s]ometimes everyday, sometimes maybe every other day." Abel told J.A. not to tell anyone what was happening, because Abel "would get in trouble."

Ray Donaldson, a retired Vacaville police officer, was present during the forensic interview of E.A. in August 2003, and of J.A. on September 4, 2003. After E.A.'s interview, but before J.A.'s, Donaldson notified Abel of the investigation. On August 21, 2003, Donaldson talked to Abel at his home. At that time, Abel knew E.A. had made allegations against him. Abel was not arrested until August 26, 2003.

After J.A.'s interview, in which J.A. described Abel's use of computers and the images on the computers, Donaldson obtained and executed a search warrant of Abel's residence in Vacaville on September 30, 2003. He found cameras and a laptop computer, but not the two desktop computers identified by the witnesses. Donaldson testified "[i]t was apparent there was a computer in the living room at one time [because the] . . . desk still had the wires that you would connect to the computer." There was "a printer, looks like maybe a fax machine, some computer software, a mouse and a lot of wires, but no computer." Donaldson sent the laptop to the "Northern Task Force on computer examinations," where personnel examined it and determined it contained no hard drive.

James Ponder, a senior special agent with the Department of Homeland Security, Immigrations and Customs Enforcement, testified as an expert in computer forensics. He was the co-leader of a multinational project targeting Russian Web sites involving photographs of children under the age of 15, "[m]ostly children posing either under clad or nude." As part of his investigation, he used an undercover credit card and an undercover name, and logged onto the Web sites. Ponder used a forensic tool called a teleport probe that allowed him "to capture the entire Web site and then burn it to a DVD." His team "captured a number of these Web sites." One of them was called Sunshineboys.com, which contained photographs of boys aged approximately 10 to 15

years old, "posed indoors and outdoors, sometimes under clad, mostly nude in various stages of arousal."

Russian police subsequently executed a search warrant, seized images and sent them to the Cyber Crime Center in the United States. The team at the Cyber Crime Center forensically examined the "images of the hard drive from the server," and extracted information that a "John Patrick Abel," with the same address as Abel's residence in Vacaville, had accessed five Web sites, including Sunshineboys.com, that contained photographs of naked or partially naked boys. Payment for access to the sites was made by two credit cards, both in Abel's name, with associated e-mail addresses of Airliftsupport@aol.com and Discmaker@yahoo.com. A printed log indicated the dates on which Abel's credit cards were used to pay for access to the Web sites: June 29, 2002, August 15, 2002, October 9, 2002, February 20, 2003 and February 25, 2003. The log was not introduced in evidence, but Ponder testified to its contents.

Ponder agreed his knowledge was "limited to the images and the data that . . . [the Cyber Crime Center] received from Russia." He testified information regarding the specific images viewed on Abel's computer "would not have been on the Russian server. It would have been on [Abel's] hard drive."

The videotapes of the police interviews of E.A. and J.A. also were admitted into evidence and played for the jury. The minors' descriptions of the events in the interviews and during their trial testimony varied in some respects. J.A. was first interviewed by police on September 8, 2003, when he was 11 years old. In that interview, he said Abel touched him on his "[p]rivate parts" when he was nine years old, and that it happened at his father's apartment either in Abel's room or on the couch. J.A. thought the first time Abel touched him was when he was "very little [¶] . . . [¶] . . . maybe three." It was "hard to remember" the first time it happened. J.A. remembered that he slept in Abel's bed more than 10 times. Every time he slept in his father's bed, Abel would "put his hand down and it would go into my underwear." J.A. told police more than once that his father did not realize he was doing it. In response to questioning about what Abel did with his hand, J.A. told police he did not want to talk about it. J.A. told police in the first

interview about his father taking pictures of him on the couch, and that Abel used a digital camera and "probably" put the pictures on the Internet. J.A. saw the pictures on the computer screen. J.A. also told police he touched his father's penis when he was "probably nine," because he did not know any better. Something "[c]lear white" came out of Abel's penis.

In J.A.'s second interview with police when he was 13 years old, he remembered the first time Abel touched his penis was when he was "probably" six years old. J.A. told police Abel touched his penis when he was in his father's bed. The last time was when he was about 10 years old. It "seemed like" Abel molested him every time J.A. visited him. Abel also had J.A. touch Abel's penis, and semen came out. J.A. told police Abel paid him $5 "for doing it." Abel had a digital camera, and used it to take pictures of J.A. without pants on and put those pictures on his computer. J.A. saw his own picture on Abel's computer, as well as pictures of naked children, and naked children touching adults. Mother asked him if anything had happened, and J.A. told her no because he was afraid.

In E.A.'s first interview with police, when she was six years old, she told them "My dad, in my private part he keeps on doing this and I tell him I don't want to wake up in the middle of the night to—to tell him to stop." Abel first touched her private parts when she was five years old. E.A. told police she and Abel "were making cookies and before we made cookies I sat with my dad and then the shades were closed and then he did it and then I told him to stop and I'm starting to get tired of that." She also told them Abel did the same thing about a week before the interview. He touched both outside and inside her private parts. It happened more than five and less than 10 times. She told police Abel said to her: " 'If you ever want to touch it [(referring to his penis)], hold on to it, squeeze it or anything, you can.' But I never wanted to." E.A. had a second interview with police when she was nine. She referred to Abel as "Mr. Wonderful." E.A. was not happy with Abel, because "he did something bad to me. He molested me." The first time Abel did that, E.A. was "three, or five," and the last time she was six or seven or eight. Abel touched her vagina "[j]ust like a couple times probably, because

[she] didn't let him touch [her] any other times." She did not see any pictures of naked people on his computer. Abel told her " 'If you're ever scared, just hold on to my penis,' " but E.A. "[n]ever once" touched Abel's penis. E.A. remembered telling Detective Donaldson about an incident when she and Abel were making cookies, but "I forgot most of it."

Lee Stuart Coleman, M.D., testified for the defense as an expert in forensic psychiatry regarding suggestibility of children. Dr. Coleman has been a practicing psychiatrist since 1974. He chose not to take the test to become board certified because "the required answers are really what I call [the] party line of what psychiatry is promoting," with which he disagreed. He has not had or sought privileges at any hospitals since the mid-1980s, and has been working out of his home since 1974. Dr. Coleman has published six or seven peer-reviewed articles, and a "smaller number . . . in lay publications," including pornographic magazines such as Hustler. He was a co-author with a criminal defense attorney of a publication entitled "False Accusations of Child Sexual Abuse." Dr. Coleman also spoke at seven or eight meetings of a group called VOCAL, an acronym for Victims of Child Abuse Laws.

Dr. Coleman testified regarding certain hypothetical situations presented to him about interviewing children who had reported sexual abuse. He believes an interviewer should not "feed" information to a child by asking questions which give the child a choice between different options, or suggest that the child is not revealing everything. Dr. Coleman opined it would be improper for an interviewer to ask a child who reported being touched whether the touching was outside or inside his or her clothing, or to ask if the touching happened greater than or less than a particular number of times. He also testified to his belief that investigators of child sexual abuse often convey the message to a child that the child is "not performing well enough, here is the way to perform better, here is the way to make me happier with your answer." He believes telling a child "It's really okay to talk about it" is a "suggestive technique." Dr. Coleman testified "memory does not get better with time . . . [i]t works the other way around."

IV. DISCUSSION

A. Admission of Evidence of Abel's Accessing Child Pornography Web Sites

Abel contends the trial court erred in multiple ways in admitting Ponder's testimony about Abel's accessing child pornography Web sites.[4] He argues this evidence was not timely disclosed to the defense, lacked foundation, was improper character evidence, and was hearsay, the admission of which violated his Sixth Amendment confrontation rights. He further maintains that even if the evidence was properly admitted, it was more prejudicial than probative and should have been excluded under Evidence Code section 352.

The Attorney General concedes the prosecution failed to lay a sufficient foundation for admission of the evidence and therefore it was erroneously admitted. We agree. Accordingly, we do not address Abel's other arguments in connection with this evidence, and address only the consequences of its erroneous admission.

Abel maintains the error in admitting the evidence was of constitutional dimension under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), requiring application of the *Chapman* prejudice standard. He asserts the computer printout about which Ponder testified, showing the date and time Abel accessed a child pornography Web site, was hearsay, and he thus was denied his constitutional right to confront and cross-examine witnesses against him.

The Attorney General argues the computer data as to which Ponder testified was not hearsay under *People v. Hawkins* (2002) 98 Cal.App.4th 1428. Accordingly, the Attorney General maintains *Crawford* does not apply and review is pursuant to the *Watson* prejudice standard.

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[4] Because the Web site images were of children, mostly boys aged approximately 10 to 15 years old, "sometimes under clad, and mostly nude in various stages of arousal" but not engaged in actual sexual intercourse, the trial court ruled Ponder could not use the terminology "child pornography" in front of the jury. He therefore described the Web sites as containing images of naked children and "[c]hild erotic activity." Given the content of the Web site, we have no difficulty in using the terminology "child pornography."

In *Hawkins*, the court distinguished between information stored in and then retrieved from a computer, and information generated by a computer's own internal operating system. The former category of information, provided by a declarant and later retrieved from a computer, is hearsay. The latter category of information, which includes printouts of data generated by the computer's internal operations without human intervention, is not hearsay. " 'It does not represent the output of statements placed into the computer by out of court declarants.' " (*People v. Hawkins, supra*, 98 Cal.App.4th at p. 1449, quoting *State v. Armstead* (La. 1983) 432 So.2d 837, 840.) "A printout of a computer's internal operations is not hearsay and a sufficient foundation requires proof only that the computer was operating properly at the time of the printout." (Simons, Cal. Evidence Manual (2008-2009) § 2:2, p. 71.)

Due to the lack of foundational information provided by the prosecution it is impossible to determine whether the computer information to which Ponder testified is or is not hearsay—that is, whether the information was a specially prepared compilation of data gleaned through forensic analysis or was simply a computer printout of computer generated data—let alone whether the computer was operating properly both at the time the information was recorded or generated and the time it was extracted. We therefore do not decide whether there was *Crawford* error. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1015-1016 [finding it unnecessary to examine "the complex constitutional question" because there was harmless error].) Instead, we conclude that even under *Chapman*, the admission of Ponder's testimony did not constitute prejudicial error. (See *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225 ["A violation of the confrontation clause is subject to harmless-error analysis."].)

Under the *Chapman* standard, " ' "we must determine on the basis of 'our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of the average jury,' [citation], whether [the evidence was] sufficiently prejudicial to [defendant] as to require reversal." [Citations.]' " (*People v. Houston* (2005) 130 Cal.App.4th 279, 295-296, quoting *People v. Anderson* (1987) 43 Cal.3d 1104, 1128.) "The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt

that a rational jury would have found the defendant guilty absent the error?' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 608, abrogated on other grounds as noted in *People v. Lopez* (2009) 177 Cal.App.4th 202.) "The admission of cumulative evidence, particularly evidence that is tangentially relevant to establishing a defendant's guilt, has been found to be harmless error. [Citation.] Even when confessions are involved, 'if the properly admitted evidence is overwhelming and the . . . extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless.' " (*People v. Houston*, *supra*, 130 Cal.App.4th at p. 296, quoting *People v. Anderson*, *supra*, 43 Cal.3d at p. 1129.)

The evidence of Abel's access to child pornography sites was tangential to the charged crimes since Abel was not charged with possession of child pornography. Rather, the evidence was offered to corroborate J.A.'s testimony that Abel showed him pictures of nude boys on the computer while he molested him. Accordingly, the evidence was " 'merely cumulative of other direct evidence.' " (*People v. Houston*, *supra*, 130 Cal.App.4th at p. 296.)

Our review of the record also establishes the evidence of Abel's guilt was overwhelming. Both children's uncontradicted testimony established Abel's guilt. Indeed, Abel concedes "the complaining witnesses, and in particular, [J.A.], described instances that standing alon[e] would be sufficient to convict of molestation . . . ." E.A. testified regarding two specific instances of Abel touching her vagina. Though her description of events changed somewhat from her first and second police interviews to her trial testimony five years later, it was consistent in all material respects. Notably, as Abel concedes, E.A. testified consistently about Abel molesting her on a chair at a time when they made cookies together. She also consistently denied ever touching Abel's penis despite his invitation to do so. Likewise, J.A.'s testimony included the same details he gave in police interviews, including that Abel took photographs of him, used a digital camera, and put the photos on his computer. In addition to being consistent, this testimony was not the type of information a child would be expected to know absent actual experience, giving J.A.'s testimony increased indicia of reliability. There also was

evidence of Abel's own consciousness of guilt. Abel was told about E.A.'s allegations prior to officers obtaining a search warrant. When police executed the warrant, his desktop computer was missing and the hard drive had been removed from his laptop. As Ponder testified, the child pornographic images Abel viewed "would have been on [Abel's] hard drive."

Abel argues the evidence, while "sufficient to convict," was not overwhelming. He asserts the children were asked "leading" questions in their initial interviews and complains their memories improved over time. He asserts Mother was biased against him and feared losing custody of the children because of "apparent" parenting deficiencies.[5] Finally, he argues there was no medical examination of E.A., nor a forensic examination of a computer Abel gave to J.A. Even assuming the truth of these contentions, the evidence Abel committed the crimes against his children was overwhelming.

We thus conclude Ponder's testimony concerning dates Abel accessed child pornography Web sites, as shown on the computer printout, was harmless beyond a reasonable doubt.

B. Admission of Evidence Under the Fresh Complaint Doctrine

Abel argues the trial court erred in allowing Mother's testimony of E.A.'s statements in the bathroom about Abel touching her without giving a limiting instruction that this evidence was admissible only for a nonhearsay purpose. He also claims the trial court erred in giving CALCRIM Nos. 303 and 318 without modification to reflect the limited purpose of Mother's testimony.[6] While conceding his counsel failed to request

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[5] On appeal, Abel claims Mother's "failure to pursue alleged claims of inappropriate contact (between J.A. and Abel) years prior to contacting authorities for investigation" evidenced "inadequate parenting." At trial, however, he urged Mother was "preoccup[ied] with molest" and therefore often questioned J.A. about being molested.

[6] Defense counsel's only objection to Mother's testimony was "having read the recitation of facts the district attorney puts in their motion, I would object simply that it's not completely accurate in terms of the discussion that [E.A.] had with [M]other." The prosecution agreed the statement of facts in its motion was not entirely complete. The trial court allowed the proffered "fresh complaint" testimony, ruling "Obviously the

either a limiting instruction or modifications to the standard instructions, Abel argues such requests would have been futile and, alternatively, failure to make such requests constituted ineffective assistance of counsel.

Mother's hearsay testimony of E.A.'s statements about the molestation was allowed under the "fresh complaint doctrine." Under that doctrine, "proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*People v. Brown* (1994) 8 Cal.4th 746, 749-450.) The jury may consider evidence of the fresh complaint " 'for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime.' " (*People v. Manning* (2008) 165 Cal.App.4th 870, 880, quoting *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522.) As the court in *Brown* explained: "The circumstances under which the alleged molestation finally came to light was reasonably probative of the likelihood that the alleged molestation did or did not occur." (*People v. Brown, supra*, at p. 764.)

While the trial court "must instruct the jury as to the limited purpose for which the fresh complaint evidence was admitted" if requested, it has no sua sponte duty to do so. (*People v. Manning, supra*, 165 Cal.App.4th at p. 880.) A "defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

Abel's trial counsel did not request a limiting instruction at the time Mother testified, nor did he object to or propose modifications to the standard CALCRIM

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defense can cross-examine regarding any inconsistencies. It will be admitted only for the nonhearsay purpose of establishing the circumstances surrounding the disclosure and the fact of disclosure, and the defense can address whatever they need with that. It's only being admitted for nonhearsay purposes."

instructions. On appeal, Abel fails to explain why such a request or objection and proposed modifications would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) Accordingly, Abel has waived his claims of error. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714.)

Abel alternatively argues that if his instructional claims were waived on appeal, as we have concluded, he suffered ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was inadequate when measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case in such a manner that the representation "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (S*trickland v. Washington* (1984) 466 U.S. 668, 686.) " 'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny [citation].' " (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1335, quoting *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) " 'Although deference is not abdication . . . , courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' " (*People v. Brodit*, *supra*, at pp. 1335-1336, quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

When a claim of ineffective assistance of counsel is raised on appeal, rather than by way of a petition for writ of habeas corpus, and no explanation for counsel's claimed failures appears, we must reject the claim unless the defendant can establish there was no reasonable tactical or strategic explanation for counsel's actions or inactions. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Abel claims "there is no basis to search for a strategic reason for any failure to make a proper objection. It was apparent that defense counsel sought to keep the evidence out by the objection that was made." Peremptorily attempting to keep evidence out is one thing, constraining its use by way of limiting instructions is another. Once evidence is allowed, counsel may change tactics and try to use the evidence for advantage.

Our review of the record suggests defense counsel may well have had a strategic reason for not requesting limiting instructions, namely that he planned to make

unrestricted use of Mother's testimony in closing argument. Defense counsel argued to the jury, for example, that Mother persisted in questioning E.A. about potential abuse in order to suggest to her daughter that abuse occurred. Defense counsel also argued Mother's persistent questioning of her daughter indicated she did not believe the child. He argued Mother was "not satisfied with the answer that the six year old gives her [about her rash], she goes further in the next question, [asking] 'Has someone been touching you?' [¶] . . . That's the polite way of saying, 'I don't really believe what my daughter is saying.' " We therefore conclude Abel cannot make any meritorious ineffective assistance of counsel on the record here.

V. DISPOSITION

The judgment of conviction is affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.